

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOHN HARPER and LANA KUDINA,)

Plaintiff,)

v.)

COLDWELL BANKER BARBARA SUE)

SEAL PROPERTIES and PYRAMID)

HOMES INCORPORATED,)

Defendants.)

No. CV-06-1457-HU

FINDINGS & RECOMMENDATION

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1 - FINDINGS & RECOMMENDATION

1 HUBEL, Magistrate Judge:

2 Plaintiffs John Harper and Lana Kudina filed an action against
3 defendants in the Superior Court of the State of Washington, Clark
4 County. On October 16, 2006, plaintiffs removed that action to
5 this Court. Defendants move to remand the action back to state
6 court. I recommend that the motions be granted.

7 Removal of cases from state court is governed by 28 U.S.C. §
8 1441. Removal is the defendant's prerogative, not the plaintiff's.
9 The statute vests the right to remove in "the defendant or
10 defendants." 28 U.S.C. § 1441(a). "Congress has given the right
11 to remove lawsuits to defendants, not to plaintiffs." Guttman v.
12 Silverberg, 374 F. Supp. 2d 991, 992 (D.N.M. 2005); Southland Corp.
13 v. Estridge, 456 F. Supp. 1296, 1300 (C.D. Cal. 1978) (plaintiff
14 who chooses to commence the action in state court cannot later
15 remove to federal court, even to defend against a counterclaim).

16 Because plaintiffs removed the case to this Court without
17 authority to do so, the case should be remanded. 28 U.S.C. §
18 1447(c).

19 Two other bases for remand are also apparent from the record.
20 First, the notice of removal must be filed within thirty days after
21 the receipt by the defendant of a copy of the initial pleading
22 setting forth the claim for relief. 28 U.S.C. § 1446(b).
23 Plaintiffs filed their state court Complaint on May 8, 2006. Exh.
24 1 to "CBBSSP TABLE OF CONTENTS" filed by plaintiffs with Notice of
25 Removal. Coldwell Banker Barbara Sue Seal was served with the
26 Summons and Complaint on May 9, 2006. Id. It is unclear when
27 defendant Pyramid Homes was served.

28 Plaintiffs filed an Amended Complaint in state court on or

1 about August 17, 2006. Exh. 12 to "CBBSSP TABLE OF CONTENTS" filed
2 by plaintiffs with Notice of Removal. The certificate of service
3 attached to the Amended Complaint shows that plaintiffs served a
4 copy of the pleading to counsel for Coldwell Banker Barbara Sue
5 Seal, by mail, on August 17, 2006, and on the registered agent for
6 Pyramid Homes by hand delivery, also on August 17, 2006.

7 Even using August 17, 2006 as the operative date for starting
8 the thirty-day clock rather than a date in May 2006 when the
9 original Complaint was filed, removal on October 16, 2006, is
10 beyond the thirty-day time period allowed in 18 U.S.C. § 1446(b).
11 Thus, the case should be remanded.

12 Second, 28 U.S.C. § 1441(a) makes clear that removal of a
13 state court action to a federal court must be to the "district
14 court of the United States for the district and division embracing
15 the place where such action is pending." Because this action was
16 pending in Clark County, Washington, the United States District
17 Court for the District of Oregon is not the appropriate removal
18 court.

19 For all of the above reasons, the defendants' motions to
20 remand should be granted.

21 Defendants have requested that plaintiffs be ordered to pay
22 fees associated with defendants' motions to remand. 28 U.S.C. §
23 1447(c) ("An order remanding the case may require payment of just
24 costs and any actual expenses, including attorney fees, incurred as
25 a result of the removal."). A recent Ninth Circuit case explains
26 that a 2005 Supreme Court case "established the general rule that
27 'absent unusual circumstances, courts may award attorney's fees
28 under § 1447(c) only where the removing party lacked an objectively

1 reasonable basis for seeking removal. Conversely, when an
2 objectively reasonable basis exists, fees should be denied.'" Associates Nat'l Bank. v. Erum, No. 04-16436, 2006 WL 3017424, at
3 *1 (9th Cir. Oct. 17, 2006) (quoting Martin v. Franklin Capital
4 Corp., 126 S. Ct. 704, 711 (2005)).

5
6 Here, plaintiffs lacked an objectively reasonable basis for
7 removal. An award of costs and fees is appropriate. I recommend
8 that should the Article III District Judge adopt this Findings &
9 Recommendation, the fee requests be granted in an amount determined
10 by the Article III District Judge.

11 Finally, plaintiffs move for an order of sanctions against
12 Pyramid Homes's counsel Albert Schlotfeldt. Because it is
13 inappropriate for this Court to rule on this motion given my
14 conclusion that the action was improperly removed here, I stay this
15 motion until after a ruling by the Article II District Judge. If
16 the Article III District Judge adopts this Findings &
17 Recommendation, I recommend that this motion be denied.

18 CONCLUSION

19 Defendants' motions to remand (#7, #10) should be granted, as
20 should defendants' requests for fees and costs in an amount
21 determined by the Article III District Judge. Plaintiffs' motion
22 for sanctions (#13) is stayed, but should be denied if the Article
23 II District Judge adopts this Findings & Recommendation.

24 SCHEDULING ORDER

25 The above Findings and Recommendation will be referred to a
26 United States District Judge for review. Objections, if any, are
27 due November 14, 2006. If no objections are filed, review of the
28 Findings and Recommendation will go under advisement on that date.

1 If objections are filed, a response to the objections is due
2 November 28, 2006, and the review of the Findings and
3 Recommendation will go under advisement on that date.

4 IT IS SO ORDERED.

5 Dated this 30th day of October, 2006.

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8 /s/ Dennis James Hubel
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Dennis James Hubel
United States Magistrate Judge
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